In the

Supreme Court of the United States

October Term, 1975

No. [redacted]

MICHAEL SUTLER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the
Third Circuit

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August, 1975

[redacted]

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Third Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 20, 1975.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit affirmed petitioner's conviction without opinion. The Judgment-Order of the Court is reproduced in Appendix A, attached hereto.

The Order and Memorandum-Opinion of the trial court denying petitioner's pre-trial motion to suppress evidence is reproduced in Appendix B, attached hereto.

JURISDICTION

The judgment whose review is sought was entered on June 20, 1975. Petitioner's petition for rehearing and for rehearing in banc in the Court below were denied on July 15, 1975 without opinion.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where a federal search warrant was based on an affidavit containing hearsay statements of an informant which were essential to a determination of probable cause, where the affiant did not assert that the informant was credible or her information reliable, where the only facts supplied by the informant which were corroborated were two facts which were both innocent in appearance and readily available to many persons, and where there were no other indicia of criminal behavior in the affidavit, did a seizure pursuant to the warrant violate the Fourth Amendment to the Constitution of the United States, Rule 41 of the Federal Rules of Criminal Procedure, and the right to fundamental justice in the federal courts as supervised by this Court?

2. Where a federal search warrant was based on an affidavit containing hearsay statements of an informant which were essential to a determination of probable cause, where the affiant did not assert that the informant was credible or her information reliable, where the affidavit identified the informant by name but did not state whether the informant was a professional informant or a "citizen informant", and where the affidavit in fact revealed that the informant was not an innocent bystander or victim but rather was, like the person implicated by her statements, an employee of the allegedly illegal business, did a seizure pursuant to the search warrant violate the Fourth Amendment to the Constitution of the United States, Rule 41 of the Federal Rules of Criminal Procedure, and the right to fundamental justice in the federal courts as supervised by this Court?

3. Where a federal search warrant was based on an affidavit containing hearsay statements of an informant which were essential to a determination of probable cause, where the affiant did not assert that the informant

was credible, and where the minimal information corroborated by the affiant was not such as to establish that the informant was trustworthy, did a seizure pursuant to the warrant violate the Fourth Amendment to the Constitution of the United States, Rule 41 of the Federal Rules of Criminal Procedure, and the right to fundamental justice in the federal courts as supervised by this Court, even if the informant's statements were against her pecuniary interest?

4. Where a federal search warrant was based on an affidavit containing hearsay statements of an informant which were essential to a determination of probable cause, where the affiant did not assert that the informant was credible, where the informant based her statements on hearsay, where the reliability of this second level of hearsay was not established, and where the minimal information corroborated by the affiant was insufficient to establish both that the informant was generally trustworthy and that her information had been obtained in a reliable way, did a seizure pursuant to the warrant violate the Fourth Amendment to the Constitution of the United States, Rule 41 of the Federal Rules of Criminal Procedure, and the right to fundamental justice as supervised by this Court?

5. Where the seizure of films being shown in a commercial theater was sought, did the special values of freedom of expression protected by the First Amendment to the Constitution of the United States mandate that the probable cause required by the Fourth Amendment to the Constitution of the United States, Rule 41 of the Federal Rules of Criminal Procedure, and the right to fundamental justice in the federal courts as supervised by this Court, be established to a higher degree than if stolen goods, objects dangerous in themselves, or the like had been sought; and if so, was such higher degree of probable cause established by the affidavit here?

6. Where, in an affidavit for a federal search warrant, all the allegations concerning interstate transportation related to one film, and where the affiant merely related that it was being shown together with another film as a double-feature at a commercial theater, did the seizure of the other film violate the First and Fourth Amendments to the Constitution of the United States, Rule 41 of the Federal Rules of Criminal Procedure, and the right to fundamental justice in the federal courts as supervised by this Court?

7. Where the judge who issued a federal search warrant for the seizure of a film being exhibited in a commercial theater had not previously viewed the film, did the seizure violate the First and Fourth Amendments to the Constitution of the United States, and the right to fundamental justice in the federal courts as supervised by this Court?

8. Where a motion to suppress evidence, made during trial, was made as soon as petitioner learned of the prosecution's possession of and intention to introduce a film into evidence, did the refusal of the trial court to consider the motion to suppress and to hold a hearing thereon violate the First and Fourth Amendments to the Constitution of the United States, Rule 41 of the Federal Rules of Criminal Procedure, and the right to fundamental justice in the federal courts as supervised by this Court?

9. Where in a prosecution for interstate transportation of obscenity, the trial court refused to admit any other evidence of contemporary community standards of obscenity, did the refusal of the trial court to admit into evidence a survey of contemporary community attitudes toward explicit sexual films generally, without reference to the particular films involved in the case at bar, violate petitioner's rights under the First and Fifth Amendments to the Constitution of the United States and his right to

fundamental justice in the federal courts as supervised by this Court?

10. Where the intended and probable recipient group for a film consists of adults who patronize "adult theaters", must the issue of the offensiveness of the film be judged by the standards of this limited community, as a matter of Freedom of Expression under the First Amendment, Due Process under the Fifth Amendment, and fundamental fairness in the federal courts?

11. Were the three films at issue here legally obscene?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute which petitioner was convicted of violating, 18 U.S.C. § 1462, the statute which petitioner was convicted of conspiring to violate, 18 U.S.C. § 1465, and the general conspiracy statute, 18 U.S.C. § 371, are set forth in Appendix C hereto.

The pertinent provisions of the First, Fourth and Fifth Amendments to the Constitution of the United States are also set forth in Appendix C hereto.

STATEMENT OF THE CASE

On November 19, 1974, petitioner Michael Kutler was convicted in the United States District Court for the Western District of Pennsylvania on four counts of violations of federal laws relating to the interstate transportation of obscene materials. He was sentenced to three years imprisonment and a fine of $2,000.00; execution of two and a half years of the sentence of imprisonment was suspended. His conviction was affirmed without opinion by the United States Court of Appeals for the Third Circuit in a Judgment Order entered on June 20, 1975 (Appendix A, attached hereto). Petitioner is presently free on bond pending final resolution of the instant petition.

Two of the counts charged that on or about April 30, 1974, Michael Kutler knowingly used and caused to be used a common carrier (the Greyhound Corporation), for transporting from Ohio to Pennsylvania two obscene films, entitled "P" and "Getting It On", in violation of 18 U.S.C. § 1462 (Appendix B, attached hereto). The other two counts charged that petitioner Kutler conspired with others to violate 18 U.S.C. § 1462 as well as 18 U.S.C. § 1465, which prohibits interstate transportation of obscene films for sale or distribution (Appendix B, attached hereto). The first conspiracy allegedly occurred from May 13, 1973 until April 19, 1974, and the second from April 18, 1974 until the time of the indictment. No film names were mentioned in the conspiracy counts.

Following indictment, but before trial, petitioner filed a motion to suppress the above-mentioned films, the only two films identified by name in the indictment. The motion asserted that the affidavit on which the warrant was based did not establish probable cause to believe that the films had been transported in interstate commerce. The motion was denied, and these two films were later introduced into evidence at petitioner's trial. Six of the grounds urged in support of the instant petition for certiorari relate to the refusal of the trial and appellate courts to suppress these films.

The affidavit contained the following information, rearranged here in chronological order. (The affidavit is reproduced in Appendix D. The description of the two films is omitted since the adequacy of this description is not contested here.) On May 1, 1974, the affiant, an FBI agent, noted a newspaper advertisement stating that a film entitled "P" plus an additional unnamed film were to commence May 3, 1974 at the Liberty Theater in Pittsburgh, Pennsylvania (Affidavit, ¶ 2). Also on May 1, 1974, he obtained a waybill from the assistant terminal manager at the Greyhound bus station in Pittsburgh. The waybill

indicated that an eleven pound box, whose content was unidentified, had been sent from Cleveland, Ohio to one Anthony Cesario (later a co-defendant in this case) and that the addressee had picked it up on April 30, 1974 (*id.*, ¶7).

Two days later the affiant interviewed, at some unspecified place and time, one Suzanne Simoni, who told him she was a cashier at the Liberty Theater (*id.*, ¶ 3). She stated to him that the aforementioned Anthony Cesario was the manager of the theater, that she had overheard him call the Greyhound bus station on April 30, 1974 and inquire whether a box had arrived for him, that following this call, Cesario had told her and one Robert Leininger (not otherwise identified in the affidavit), that he was going to the Greyhound Station "to pick up the film to be shown commencing Friday, May 3, 1974", and that later that day Cesario had entered the theater with a box and stated that it was "the film above mentioned" (*id.*, ¶¶ 3, 4, and 5). At this point in the affidavit, the only film which had been mentioned by name was "P" (*id.*, ¶ 2).

Also during this interview of May 3, 1975, the informant informed the affiant that on May 1, 1975, Cesario had told her that two films, entitled "P" and "Getting It On", would be exhibited at the Liberty Theater commencing May 3, 1974 (*id.*, ¶ 6).

The affiant viewed these films on May 3, 1974 and described them in his affidavit (*id.* ¶ 8). He also noted that on May 8, 1974, the date he applied for the search warrant, these films were still being advertised on the marquee (*id.*, ¶ 9).

There is no other material information in the affidavit.

On the basis of this affidavit alone, the motion to suppress these two films was denied. (See Appendix B.)

At trial, a third film, "It Happened In Hollywood", was offered into evidence by the prosecution. Petitioner immediately moved to suppress it but the court summarily refused to hold an evidentiary hearing on his motion. The film, which had not been seized with the other two, was thereupon received in evidence and exhibited to the jury. Although a copy of the film had played earlier at the Liberty Theater, the print admitted into evidence in the instant case had been seized at a theater in Cleveland, Ohio (Tr. 324).

The trial court refused to hold a hearing on petitioner's motion to suppress this film for two reasons. First, it found the motion "untimely" because made "in the middle of the trial" (*ibid.*), even though petitioner had not previously known that the government possessed the film, nor where it had been obtained, nor that the government intended to introduce it into evidence (Tr. 326-327). The court's second reason for refusing to hold a hearing was based on the fact that the seizure of the film in Cleveland, Ohio, had occurred pursuant to a search warrant obtained after a viewing of the film by Cleveland police officers (Tr. 324). The trial court stated that it was "obvious" that the affidavit in support of the warrant application would contain a description of the film, and that this description would be sufficiently detailed and comprehensive to establish probable cause (Tr. 329). This was mere conjecture because there was no testimony in the record that the film had been described at all, even briefly, to the judicial officer who issued the warrant in Cleveland (*Compare* Tr. 324). Nor had the judge who issued the warrant accompanied the police officers to the theater to view the film prior to signing the warrant (Tr. 324).

As part of his defense, petitioner offered a survey of community attitudes toward films containing explicit sexual material (Tr. 386); the prosecution had not offered such a poll, nor any other evidence of community atti-

tudes. The survey commissioned by petitioner had been conducted in southwestern Pennsylvania, the area from which the jurors had been drawn and which the trial court had ruled was the "community" whose standards were relevant to determining the obscenity of the films (*ibid.*; Tr. 645). Petitioner offered a statistician to validate the results of the survey (Tr. 374-375), and a clinical psychologist to interpret the results (Tr. 386).

The trial court excluded the survey as well as all other evidence offered by the defense concerning community standards of obscenity. For example, after severely limiting the scope of testimony concerning the fact that many other theaters in the Pittsburgh area show movies similar to the ones at issue here (Tr. 445-447; cf. 130-131), the trial court then destroyed the value of even this minimal evidence by charging the jury that the "presence in the community of other films similar to those shown here, if those films actually exist in the community, is irrelevant to your determination of this case" (Tr. 651, objected to at Tr. 656). Along the same lines, the trial court refused to take judicial notice of the fact that Pennsylvania had no law prohibiting the showing of obscene films to adults* and prohibited petitioner from discussing this fact and its relevance to community standards in his closing statement to the jury.

After these adverse rulings by the trial court, petitioner Michael Kutler was convicted by the jury. It is this conviction from which he seeks relief by this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

Nine of the eleven questions presented by the instant petition concern petitioner's contention that the three films shown to the jury should have been suppressed. An over-

*There was no evidence or claim that minors were ever permitted to see any of the films involved in this case (see Tr. 651).

view of these interrelated search-and-seizure issues follows.

The three films introduced by the government were "P", "Getting It On", and "It Happened in Hollywood". The first two of these were seized pursuant to a search warrant served at the Liberty Theater in Pittsburgh; were mentioned by name in the indictment; and were the subject of a pre-trial motion to suppress, which was denied. Petitioner maintains that these two films should have been suppressed because the facts contained in the affidavit did not establish that the informant was credible or her information reliable, nor that she had obtained her information in a reliable way. The contentions of the prosecution that credibility was sufficiently established by corroboration, by the informant being a "citizen informant", and by admissions purportedly against pecuniary interest, are the subjects of Questions I, II and III, respectively. The issue concerning the manner in which she obtained her information is the subject of Question IV. All four of these questions are discussed in Section I, below.

Question V, and Section II below, also concern these two films, "P" and "Getting It On". It will be shown that they should have been suppressed because probable cause must be established to a higher degree where materials presumptively protected by the First Amendment are sought than otherwise, and because the reliability of the informant here was certainly not established to this degree (Section II, *infra*).

The film "Getting It On" is the subject of Question VI, and of Section III. Petitioner contends that even assuming *arguendo* that the tip of the informant could be credited, and there therefore were probable cause as to the film "P", there was nevertheless no probable cause as to "Getting It On" (Section III, *infra*).

The other two search and seizure issues presented by this petition, Questions VII and VIII, relate to the third

film which was shown to the jury — "It Happened In Hollywood". Unlike the other two films, this one was not mentioned by name in the indictment and was not seized at the Pittsburgh theater. At trial, when the government offered the film into evidence, petitioner moved to suppress it. The motion was denied even though the testimony had made it clear that the film had been seized without prior judicial scrutiny (See Section IV, *infra*). Furthermore, the trial judge refused to hold a hearing on this motion (See Section V, *infra*).

Finally, the three remaining questions presented by this petition — admissibility of a survey of community attitudes toward obscenity, the standards to be applied in judging obscenity where the intended and probable recipient group consists of persons who patronize "adult theaters", and the obscenity of the films themselves — are discussed in Sections VI, VII and VIII, respectively, below.

I.

THE AFFIDAVIT DID NOT ESTABLISH THAT THE INFORMANT WAS TRUSTWORTHY, NOR THAT HER INFORMATION HAD BEEN OBTAINED IN A RELIABLE WAY.

It is a fundamental principle that probable cause must be determined by a "neutral and detached magistrate", and not by "the officer engaged in the often competitive enterprise of ferreting out crime". *Johnson v. United States,* 333 U.S. 10, 14 (1948). To implement this principle, this Court has held that while a warrant may be based on hearsay, where an affidavit relies upon hearsay testimony of an informant to establish probable cause,

> "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [items to be seized] were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the

> informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable'." *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

In *Spinelli v. United States*, 393 U.S. 410 (1969), this two-prong test was further refined to require a showing both: (1) that the informer was trustworthy; and (2) that he had obtained his information in a reliable way. *Id.*, 393 U.S. at 417. Neither of these tests are met here.

The affidavit here contained not even a suggestion that the informant was credible. The prosecution, however, contended in the court below that the informant was nevertheless shown to be trustworthy because: (1) her information was corroborated by the FBI's independent investigation; (2) she was a "citizen informant"; and (3) her declarations were against her pecuniary interest. Petitioner maintains that: (A) none of these contentions are meritorious and that there has been no showing of the informant's credibility in the affidavit; and (B) the affidavit did not establish that the informant had obtained her information in a reliable way because her information consisted primarily of hearsay — hearsay which itself failed to meet the two-prong test set forth in *Spinelli* and *Aguilar*, *supra*. Each of these contentions will be considered in sequence below.

A. The Credibility Of the Informant Whose Information Was Essential To A Determination Of Probable Cause Here Was Not Established By Independent Corroboration, Nor By Her Being A "Citizen Informant", Nor By Statements Against Her Pecuniary Interest.

When an affidavit contains corroboration by independent sources, a tip may be credited if, as corroborated, it is "as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration". *Spinelli v. United States, supra*, 393 U.S. at 415. Petitioner contends that since the informant had never before been tested, (1)

the *de minimus* corroboration here was insufficient to render the tip adequate under *Aguilar;* (2) the affiant's identification of the informant by name, without stating that she was a professional informant, fails to overcome the failure of the affidavit to prove the trustworthiness of the informant; and (3) the claim that the affiant made statements supposedly against her pecuniary interest failed as well to establish the requisite trustworthiness of the informant. Each of these contentions will be considered in sequence below.

1. The independent corroboration here was inadequate to show credibility because only two facts were corroborated and these facts were both innocent in appearance and readily available to the public at large.

Independent investigation by an agent of the Federal Bureau of Investigation confirmed two pieces of information in the tip. Because only two facts were corroborated, and because these facts were both innocent-appearing and readily available to many persons, this corroboration did not establish the trustworthiness of the informant or her information.

The first fact which was corroborated was that one Anthony Cesario had picked up a box addressed to him at the Greyhound station in Pittsburgh on April 30, 1974 (¶¶ 5 and 7 of the affidavit). This fact is of little value because it is the type of information "which could easily have been obtained from an offhand remark heard at a neighborhood bar". *Spinelli v. United States, supra,* 393 U.S. at 417. It is also information available to employees of Greyhound, or to someone pretending to be Cesario's wife. Moreover, the informant did not provide any description of the box. Had she described its appearance, weight and size in detail, and had these details been independently corroborated, it might have been reasonable to believe that she had seen the box and that it was the one Cesario had

picked up at Greyhound. The one he allegedly brought into the theater might have been obtained elsewhere than from Greyhound. None of the requisite detail appears in the affidavit. Anyone could have known that Cesario had just received some kind of package via Greyhound, a facially-innocent transaction in and of itself.

The second corroboratory allegation consists of information which was a matter of public knowledge by the time the informant was interviewed. On May 3, 1974, she stated that Cesario had told her two days earlier that two named films would be displayed at the theater starting May 3, 1974 (¶6 of the affidavit). The casual passerby, not just the informant, would have had this information since by May 3, 1974, the titles of these films were being advertised on the marquee (Affidavit ¶¶ 3, 8, 9). Here, as in *Spinelli*, the FBI's independent investigative efforts indicate at most that the defendant "could have used the [box] specified by the informant for some [illegal] purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he made his charge against [Cesario] on the basis of information obtained in a reliable way". *Spinelli v. United States*, *supra*, 393 U.S. at 417.

The next step in the analysis is also set forth in *Spinelli*.

> "We conclude, then, that in the present case the informant's tip — even when corroborated to the extent indicated — was not sufficient to provide the basis for a finding of probable cause. This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to the other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a

judgment that a crime was probably being committed." *Id.*, 393 U.S. at 418.

Here, the remainder of the application discloses the receipt of an eleven pound package in interstate commerce four days before two allegedly obscene films were displayed at a commercial theater in the same city. This information does not "permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." *Ibid.*

2. Statements of an informant are not rendered trustworthy by the fact that the informant is identified by name, where the affiant does not state whether the informant was a professional informant or a "citizen informant" and where the informant was not an innocent bystander or victim.

The prosecution asserted in the Court below that the informant's statements were trustworthy because she was a "named citizen informant." It is true that she was named, and was not an anonymous informer. However, the prosecution's position was nevertheless unsound for two reasons. First, the informant was, according to her own account, the cashier at the theater exhibiting the allegedly obscene movies. She therefore was a fellow employee of the person informed upon and employed in an allegedly illegal business.* Secondly, while the affiant identified her by name, he did not state whether she was a professional, as opposed to "citizen," informant. Each of these deficiencies will be explored briefly.

Several cases have held that information provided by an innocent witness to, or victim of, a crime is inherently

*However, her statements were not against her penal interest because exhibition of obscene films to adults was not a violation of Pennsylvania state law and because a cashier would not be guilty of aiding the federal crimes involving interstate transportation. The prosecution has never asserted the contrary.

more credible than information provided by professional informants. See, *e.g., Rutherford v. Cupp*, 508 F. 2d 122 (9th Cir. 1974); *United States v. Sturgeon*, 501 F. 2d 1270, 1274 (8th Cir. 1974), cert. denied, ... U.S. .....; *United States v. Wilson*, 479 F. 2d 936, 940 (7th cir. 1973); *United States v. McCoy*, 478 F. 2d 176, 179 (10th Cir. 1973), cert. denied, 414 U.S. 828; *United States v. Rajewick*, 470 F. 2d 666, 668 (8th Cir. 1972); *United States v. Unger*, 469 F. 2d 1283, 1286-1287 (7th Cir. 1972), cert. denied, 411 U.S. 920; *United States v. Bell*, 457 F. 2d 1231, 1238-1239 (5th Cir. 1972).

"The rationale of these holdings is that the concomitant danger of self-interest does not inure to a victim or witness to a crime as easily as it would to a government informant." *United States v. Unger, supra*, 469 F. 2d n. 4 at 1287. One of these dangers is that the allegations were reported to spite the one informed upon. *Id.*, 469 U.S. at 1286-1287. Where, as here, the informant is "intimately involved with the persons informed upon and with the illegal conduct at hand," the danger of self-interest precludes assigning the word of the informant greater weight just because he is not a professional informant. *United States v. Bell, supra*, 457 F. 2d at 1238. The informant's credibility must be established by other means, such as corroboration of his information.

Furthermore, the informant here may have been a professional informant, not a "citizen" informant. She stated that she was the cashier at the theater, but this does not *ipso facto* eliminate the possibility that she was a paid and professional informant. She may have obtained her position at the urging of the FBI. The affidavit does not state how long she had been the cashier. And she may have informed upon persons both connected and unconnected with the theater while cashier. The affidavit is silent on this score.

In sum, before the neutral magistrate can attribute more weight to the word of a citizen than to that of a professional informant, he must be advised that the informant is not a professional informant, and also that he is not "involved with the persons informed upon and with the illegal conduct at hand." *United States v. Bell, supra,* 457 F. 2d at 1238.

3. Statements allegedly against pecuniary interest did not establish that the informant was trustworthy.

The prosecution argued in the Court below that the credibility of the informant was established by her statements which, according to the prosecution, were against her employer's (and hence her) pecuniary interest. However, even if her statements were somehow against her pecuniary interest, this fact did not establish credibility.

The government's argument assumes that she was telling the truth when she said she was a cashier at the theater. But the magistrate would not have been justified in assuming the truth of this statement since the affiant did not corroborate this assertion, and the informant did not provide any details which would indicate intimate familiarity with the theater. Moreover, her statements would have been against her pecuniary interest only if they would have jeopardized the continued operation of the theater, and hence her job. But there was no reason to believe this was so.

Furthermore, assuming *arguendo* that her statements were against her pecuniary interest, this fact is entitled to little weight. In *United States v. Harris,* 403 U.S. 573, this Court stated that admissions of crime "carry their own indicia of credibility". *Id.* 403 U.S. at 583 (plurality opinion). The plurality opinion contained dictum that admissions against proprietary interests also "carry their own indicia of credibility". *Ibid.* But petitioner maintains that this dictum should not be followed for the reasons set forth in

the dissent of four Justices in *United States v. Harris, supra*, 403 U.S. at 594-595 (per Mr. Justice Harlan). *See also United States v. Carmichael*, 489 F. 2d 983, 991 n.1. (Kiley, J., concurring in part and dissenting in part). And even if plurality's dictum is followed, it should not be applied where the apparent proprietary interest may be nonexistent or ephemeral. Here, for example, the informant may have intended to leave her position as cashier at the time she made her statements.

* * *

In sum, the requirement that the informant be shown to be trustworthy was not satisfied by admissions supposedly against pecuniary interest, nor by the informant being a "citizen informant", nor by corroboration of her information. The affidavit was therefore fatally deficient under the Fourth Amendment, Rule 41 of the Federal Rules of Criminal Procedure, and this Court's supervisory powers.

B. The Affidavit Did Not Establish That The Informant's Information Had Been Obtained In A Reliable Way.

The allegations of the informant which were critical to a showing that the films viewed by the affiant had traveled in interstate commerce were all based on hearsay. The informant related that one Anthony Cesario, allegedly the manager of the theater, had told her he was going to the Greyhound station to pick up these films, and that later the same day, he told her he had picked up the films. The application for the warrant was therefore based on hearsay upon hearsay.

Double hearsay can be credited only when both of the levels of hearsay meet the two prongs of the *Spinelli-Aguilar* test of reliability. *United States v. Wilson*, 479 F. 2d 936, 941 (7th Cir. 1973); *United States v. McCoy*, 478 F. 2d 176, 179 (10th Cir. 1973), cert. denied 414 U.S.

828; *United States v. Welebir*, 498 F. 2d 346, 349 (4th Cir. 1974). Not only did the first hearsay fail these tests, as discussed above, but the second level, the statements attributed to Anthony Cesario, failed them also.

Most apparent is the absence of any information to show that Cesario was trustworthy. The only statement he made which was corroborated was that he received a box at the Greyhound Station. Nor was trustworthiness established by the fact that his statements ultimately proved to be against his penal interest. In *United States v. Harris, supra*, admissions of crime by an informant were held to "carry their own indicia of credibility" (plurarility opinion). The court reasoned that: "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions". *Id.*, 403 U.S. at 583. Here, however, Cesario did not admit a crime but only receipt of a film which was later judged to be obscene. Moreover, he placed no evidence in the hands of the police. Rather, he spoke only to a fellow employee.

Furthermore, there were no allegations in the affidavit to satisfy the other prong of the *Aguilar-Spinelli* test—that he had obtained his information that the box contained the film to be shown later that week in a reliable way.

In brief, because this second level of hearsay did not pass the *Aguilar-Spinelli* test, the affidavit did not establish that the informant's report was based on information obtained in a reliable way. It was shown in Section I(A) above that the affidavit also failed to establish that the informant herself was trustworthy. It is therefore clear that the affidavit was fatally deficient because the *de minimis* corroboration provided by the FBI's independent investigation cannot "support both the inference that the informer was generally trustworthy and that he made his charge against [Cesario] on the basis of information obtained in a reliable way". *Spinelli v. United States, supra*, 393 U.S. at 417.

II.

BECAUSE THE SEIZURE OF FILMS BEING SHOWN IN A COMMERCIAL THEATER WAS SOUGHT, THE APPLICATION FOR A WARRANT WAS REQUIRED TO ESTABLISH PROBABLE CAUSE TO A HIGHER DEGREE THAN OTHERWISE; AND THE APPLICATION HERE DID NOT DO SO.

Because the objects sought here were films being shown at a commercial theater, the application for warrant was required to establish probable cause, and hence reliability of the informant, to an even greater degree than normal; this higher standard was clearly not met here.

Because of the deference due materials claiming First Amendment protection, this Court has consistently required the procedures utilized in seizing books and films to meet a higher standard than where other types of objects are seized. *See, e.g., Marcus v. Search Warrants*, 367 U.S. 717 (1961); *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *Lee Art Theater v. Virginia*, 392 U.S. 636 (1968); *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

This line of cases indicates that, under the Constitution or this Court's supervisory authority over the administration of criminal justice in the federal courts,* another fundamental requirement of the Fourth Amendment —probable cause—should be viewed "in the light of the values of freedom of expression", *Roaden v. Kentucky, supra*, 413 U.S. at 504, and "accorded the most scrupulous exactitude". *Stanford v. Texas, supra*, 379 U.S. at 485. In other words, probable cause must be established to a higher degree where, as here, films being exhibited to the public are the objects to be seized. Consequently, the trustworthiness of the informant, whose information was essential to establishing probable cause to believe these

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See, e.g., McNabb v. United States, 318 U.S. 332, 341 (1943).

films had been transported in interstate commerce, should also have been established to a higher degree.

It was argued in Section I, above, that the inadequacies of the affidavit require suppression of the objects seized, regardless of their First Amendment nature. But it is certainly clear that if the requirement of probable cause is "accorded the most scrupulous exactitude", *see Stanford v. Texas, supra*, 379 U.S. at 485, then these inadequacies mandate suppression of the films seized.

III.

SEIZURE OF A FILM WAS UNCONSTITUTIONAL AND UNLAWFUL WHERE ALL THE ALLEGATIONS CONCERNING INTERSTATE TRANSPORTATION RELATED TO A DIFFERENT FILM, AND WHERE THE AFFIANT MERELY RELATED THAT THE TWO FILMS WERE BEING SHOWN TOGETHER AS A DOUBLE-FEATURE AT A COMMERCIAL THEATER.

Even if the informant's tip were given full credence, which petitioner has argued in Sections I and II above would be unjustified, nevertheless the affidavit would not establish probable cause to believe that one of the two named films, "Getting It On," had been transported in interstate commerce.

In paragraph two of the affidavit, the affiant stated that on May 1, 1974, he saw a newspaper advertisement indicating that "'P' by Tom plus additional unspecified film" would be shown at the Liberty Theater starting May 3, 1974. In paragraph five of the affidavit, the paragraph dealing with interstate transportation, the informant relates that when Cesario entered the theater with a box on April 30, 1974 Cesario told her "that it was the film *above mentioned*" (emphasis added). At this point in the affidavit, "P" is the only film that has been mentioned. Furthermore, when the informant intended to refer to more

than one film, she said "films" not "film" (Compare ¶6 with ¶5). The informant never claims that Cesario told her he had picked up the film "Getting It On."

The magistrate issued a search warrant authorizing seizure of "Getting It On" simply because it played on the same bill at the theatre as "P". This coincidence certainly did not establish that "Getting It On" had been transported with "P". It might have been in the theater's safe or come from an intrastate shipment. A reasonable man would not be warranted in believing that it had traveled in interstate commerce, and it should therefore have been suppressed. *See, e.g., Spinelli v. United States, supra,* 393 U.S. at 419.

IV.

SEIZURE OF A FILM WAS UNCONSTITUTIONAL AND UNLAWFUL WHERE THE JUDGE WHO ISSUED THE WARRANT HAD NOT PREVIOUSLY VIEWED THE FILM.

At the time the film "It Happened in Hollywood" was seized, it was being exhibited to the general public at a theater in Cleveland, Ohio. The judge who authorized its seizure did so on the basis of an application for a search warrant – he did not accompany the police officers to the theater to view the film himself before issuing the warrant. This omission presents squarely the question reserved in *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968): "whether the [judge] should have viewed the motion picture before issuing the warrant." *Id.,* 392 U.S. at 637; *see Heller v. New York,* 413 U.S. 483 (1973).

The answer to this question is compelled by the factors which lead this court in *Roaden v. Kentucky,* 413 U.S. 496 (1973) to strike down the warrantless seizure of a film being exhibited at a commercial theater: the higher standard of reasonableness where materials claiming First Amendment protection are involved, and the ready availability of such films to judicial scrutiny. Petitioner main-

tains that because of these factors, where a film is being exhibited in a commercial theater, the judge to whom a warrant application is presented must go to the theater and view the film. Otherwise, he does not have an opportunity to "focus searchingly on the question of obscenity", by considering the dominant theme of the material taken as a whole as required by *Miller v. California, supra,* and the seizure is therefore unreasonable. *Lee Art Theater, supra,* 392 U.S. at 637; *Roaden v. Kentucky, supra,* 413 U.S. at 506. Since the film "It Happened In Hollywood" was being shown to the public when it was seized, and since its seizure was not preceded by a judicial viewing, the Fourth Amendment's prohibition of unreasonable searches was infringed. Introduction of the film into evidence violated both the exclusionary rule under the Fourth Amendment and the right to fundamental justice in the federal courts.

V.

A MOTION TO SUPPRESS MADE DURING TRIAL WAS TIMELY WHERE IT WAS MADE AS SOON AS PETITIONER LEARNED OF THE PROSECUTION'S POSSESSION OF AND INTENTION TO INTRODUCE THE FILM WHOSE SUPPRESSION WAS SOUGHT.

Petitioner moved to suppress the film "It Happened in Hollywood" when the prosecution sought to introduce it at trial, but the trial judge refused to hold a hearing on the motion. The court ruled that the motion was untimely, and also that a hearing would be fruitless.

Rule 41(e) of the Federal Rules of Criminal Procedure provides that a motion to suppress evidence

> "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion . . ."

Petitioner moved to suppress this film at the earliest opportunity and as soon as he was aware of the ground for the

motion. The United States attorney had advised him by letter prior to trial that: "Other films which may be at issue in the case are 'Devil in Miss Jones,' 'It Happened in Hollywood,' 'Teenage Cowgirls,' 'Chambermaids,' and 'Parlor Games.'" (This letter is reproduced in Appendix E filed in the Court of Appeals). But the prosecution did not disclose its intention to introduce "It Happened in Hollywood," and the four other named films were not in fact introduced at trial. Indeed, this letter does not even indicate that the prosecution possessed a copy of the film "Hollywood" or any of these other films, and of course does not state where or how they were seized. Hence, there was no opportunity prior to trial to move to suppress this film.

Furthermore, defendant Kutler did not learn of any grounds for suppression until the government produced a police officer from Cleveland, Ohio, who had been involved in its seizure. At that time, defendant learned that the judicial officer who signed the search warrant for the film had not seen the film, but instead had granted the warrant on the basis of the officer's affidavit. The trial court, however, refused to hold a hearing to determine whether the affidavit established probable cause. The court stated that the motion was untimely, and refused to hold a hearing because, in its words, "it seems to me obvious that his affidavit would say what he saw in the theater and that would be sufficient upon which a judicial officer in Ohio would issue a warrant." This assumption is totally unjustified since the Cleveland police officer had not even testified that his warrant application contained a description of the film, and since police officers have been known to incorporate less than all the information they possess in an affidavit in support of a search warrant. There was no adequate reason for the trial court's failure to at least require production of the affidavit so that it could determine the adequacy of the affidavit on its face. The

officer may have had the warrant and affidavit with him. Even if he did not, these papers could have been obtained without undue delay of the trial because it was a Friday afternoon when this matter arose, the case was not heard over the weekend, and there was ample time for the officer to return to Cleveland.

The trial court's refusal to hold a hearing violated Rule 41 of the Federal Rules of Criminal Procedure, the implicit guarantee of the Fourth Amendment that plausible grounds for suppression shall be explored at a hearing, and the right to fundamental justice in the federal courts, as supervised by this Court.

VI.

REFUSAL OF THE TRIAL COURT TO ALLOW INTO EVIDENCE A SURVEY OF CONTEMPORARY COMMUNITY ATTITUDES TOWARD EXPLICIT SEXUAL FILMS VIOLATED PETITIONER'S RIGHTS.

Two of the three prevailing guidelines for the determination of obscenity by the trier of fact require application of contemporary community standards; the prurient appeal criterion explicitly requires consideration of such standards, and the patent offensiveness criterion does so implicitly. *Miller v. California,* 413 U.S. 15, 24, 30-34; *see* Note, the Supreme Court, 1972 Term, 87 Harvard Law Review 55, 169 (1973).

The trial court below held that the "community" whose standards were to be used in this test was southwestern Pennsylvania, the area from which the veniremen had been drawn. Anticipating this ruling, petitioner had engaged a research organization to conduct a poll of the attitudes held by a statistically meaningful sample of this population toward explicit sexual materials generally. However, at trial, when petitioner offered this survey, as validated by a statistician and interpreted by a clinical

psychologist, the trial court astonishingly refused to admit it and the psychologist's testimony based on it.

It is a firmly embedded proposition of American jurisprudence that evidence has "rational probative value" and is therefore relevant if it "render[s] the desired inference *more probable than it would be without the evidence*". McCormick on Evidence, § 186 at 437 (2d Edition 1972) (emphasis in the original); *see, United States v. Pugliese*, 153 F. 2d 497, 500 (2d Cir. 1946) (Learned Hand, J.).

The evidence excluded here would have made it "more probable than it would be without" such evidence that these films "taken as a whole", with their explicit sex acts and whatever else they contain, would not transcend the community standards. Numerous other courts have upheld admission of this same opinion-attitude survey, or expert testimony based on it, in obscenity prosecutions. *See, e.g., United States v. Champion*, No. 43351-74, Superior Court of the District of Columbia, Criminal Division; *United States v. Baranov, d/b/a World Mailing Service*, No. 78-74-A (U.S. District Court, E.D. Va. 1974); *People v. Custer, et al.*, No. M 126728, Municipal Court of Bakersfield, California, Nos. 160460, 168435, 169509 and 153486. And of seven distinguished professors of sociology and law contacted by the editors of the University of Wisconsin Law Review, several indicated that a survey of the community's standards generally is more relevant to a determination of obscenity than the community's reaction to a particular work. *See* "Expert Testimony in Obscenity Litigation", 1965 Wis. L. Rev. 113, n. 27 at 121.

This Court has only once been faced with a similar issue. In *Hamling v. United States*, 418 U.S. 87 (1974), the trial court had excluded a survey because it related to local community standards, not the national community standards which the trial court held relevant. *Id.*, 418 U.S. n. 10 at 108. This court did not decide whether this ruling

was correct. It merely held that assuming that exclusion of the survey was error, the error was harmless because the defendant had introduced other expert testimony on the same subject. *Id.*, 418 U.S. at 109-110. The issues concerning the admissibility of the survey here—relevance and timeliness—were not considered in *Hamling*. And here, unlike the situation in *Hamling*, petitioner was not permitted to introduce any other evidence on the issue of community standards.

While the prosecution need not introduce expert testimony of obscenity if the materials themselves are in evidence, the "defense should be free to introduce appropriate expert testimony". *Kaplan v. California*, 413 U.S. 115, 121 (1973).

The jury in an obscenity case is entitled to draw on its own familiarity with the local community standards, but there can be no doubt that its opinion of these standards is "necessarily limited, hit-or-miss, [and] subjective". *Smith v. California*, 361 U.S. 147, 165 (1959) (Frankfurter, J., concurring).

Nor is it any answer here that the jury was entitled to draw on its own knowledge of community standards, and on that basis found defendants guilty, nor that this Court may independently find the materials obscene. *Bollenbach v. United States*, 326 U.S. 607, 614-615 (1946). As the court in *Bollenbach* stated, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal court". *Id.*, 326 U.S. at 614.**

The admissibility of surveys of community standards is an issue which has frequently arisen and will continue

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**_Bollenbach_ was decided on the basis of 28 U.S.C. § 391 (1946), the predecessor to the current harmless error statute, 28 U.S.C. § 2111. These statutes are substantially the same.

to arise in virtually every obscenity prosecution. A definite settlement of the issue by this Court to guide future prosecutions in this sphere is imperative.

VII.

WHERE THE INTENDED AND PROBABLE RECIPIENT GROUP FOR A FILM CONSISTS OF ADULTS WHO PATRONIZE "ADULT THEATERS", THE ISSUE OF THE OFFENSIVENESS OF THE FILM MUST BE JUDGED BY THE STANDARDS OF THIS GROUP.

Petitioner maintains that the question of patent offensiveness should be judged by the standards of the audience for whom the material is intended or who actually views it. Under *Mishkin v. New York*, 383 U.S. 502 (1966), the *prurient appeal* of allegedly obscene materials may "be assessed in terms of the sexual interest of its intended and probable recipient group". *Id.*, 383 U.S. at 509. Patent offensiveness should be judged by this standard also in order to assure that freedom of expression will be accorded the greatest breadth consistent with the interest of society in protecting itself from offensive acts. Furthermore, if prurient appeal can be judged in light of the "intended and probable recipient group", then as a matter of fundamental fairness under the Due Process Clause and under the supervisory powers of this Court, patent offensiveness should be so judged also. At least one court has so held. *Byrne v. 903 Boylston Street Corp.*, Suffolk No. 74-743 (Mass. Superior Court, October 15, 1974) (see Appendix F in the Court of Appeals, at p. F8). Where, as here, films are shown in an "adult theater" which shows only "adult" films, it is clear that the "intended and probable recipient group" is those persons who deliberately choose to view such films because they are attracted, not offended, by them.

Application of the "intended and probable recipient group" test to the issue of offensiveness would have a pro-

found effect not only on this case, but on virtually all obscenity prosecutions. Petitioner maintains that it should be adopted as one of the guidelines of obscenity.

VIII.

THE THREE FILMS AT ISSUE HERE ARE NOT LEGALLY OBSCENE.

This Court has a duty to reach an independent conclusion as to whether these films are obscene as a matter of law. *Jenkins v. Georgia,* 418 U.S. 153 (1974); *Miller v. California, supra; Jacobellis v. Ohio,* 378 U.S. 185 (1964). Petitioner contends that upon viewing them, this Court will not find them obscene beyond a reasonable doubt, both by application of the "intended and probable recipient group" test advocated in the preceding section, and because they have, taken as a whole, serious literary and artistic value. *See, Miller v. California, supra,* 413 U.S. at 24. Furthermore, their depictions of sexual conduct are not offensive and do not appeal to a prurient interest in sex.

CONCLUSION

This case presents substantial questions vital to the regulation of federal criminal trials in the wake of *Aguilar, Spinelli,* and *Harris,* and particularly, federal obscenity trials following *Hamling, Roaden,* and *Miller,* as well as the delineation of the constitutional rights of defendants in such trials. The questions set out in this petition for certiorari arise from, but have not been considered in these decisions, and require the plenary consideration of this Court.

The accused in the instant case was convicted after the trial court refused to suppress evidence obtained in violation of the Fourth Amendment examined "in the light of the values of freedom of expression", *Roaden v. Kentucky, supra,* 413 U.S. at 504, and after the court refused to admit legitimate and critical defense evidence probative of contemporary community standards against which the charged films were required to be weighed. Quite apart from the patent injustice of the rulings of the Court below to the petitioner, it is apparent that these issues are universal in nature and will rearise in future federal criminal and obscenity prosecutions with such frequency that guidance from this Court in this case is imperative, from the standpoints of both judicial efficiency and the preservation of the rights of the accused in the course of such litigation.

Accordingly, petitioner urges that this Court grant his petition for a writ of certiorari to review these issues.

Respectfully submitted.

BERNARD A. BERKMAN
CHARLES M. DELBAUM
BERKMAN, GORDON &
KANCELBAUM,
Counsel for Petitioner.

APPENDIX A

Judgment Order Of The United States Court Of Appeals For The Third Circuit.

Nos. 75-1060 and 75-1100

UNITED STATES OF AMERICA
v.
MICHAEL KUTLER
ANTHONY CESARIO

MICHAEL KUTLER, Appellant in No. 75-1060
ANTHONY CESARIO, Appellant in No. 75-1100

On Appeal from the United States District Court
for the Western District of Pennsylvania
Crim. No. 74-177

Argued June 9, 1975

Before: ADAMS, HUNTER and GARTH, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellants, namely, that the district court erred (1) in refusing to suppress the films "P" and "Getting It On" and in refusing to hold a hearing on defendants' motion to suppress the film, "It Happened In Hollywood;" and (2) in excluding substantial evidence that the films are not obscene, specifically evidence of community standards of prurient appeal, evidence of community standards of offensiveness, and evidence that films have scientific value; and (3) in failing to instruct the jury that the government had the burden of proving the obscenity of the films beyond a rea-

sonable doubt; and (4) in permitting counts one and two to go to the jury because there was insufficient evidence to sustain a conviction on these counts; and (5) in refusing to conduct an investigation into potential juror bias against defendants; and (6) in refusing to reverse the conviction and to dismiss the prosecution because the films in question are not obscene as a matter of law, it is

ADJUDGED AND ORDERED that the judgment of the district court be and the same is hereby affirmed.

BY THE COURT,

/s/ ARLIN M. ADAMS

Circuit Judge

ATTEST:

/s/ M. ELIZABETH FERGUSON

M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: June 20, 1975

APPENDIX B

Order And Memorandum-Opinion Of The United States District Court For The Western District Of Pennsylvania.

UNITED STATES OF AMERICA
vs.
MICHAEL KUTLER and
ANTHONY CESARIO,
Defendants

Criminal Action
No. 74-177

ORDER

AND NOW, August 22, 1974, following argument in open court on the motions of each defendant to suppress evidence, the motions of the defendants are denied.

Each defendant has alleged that the affidavit of the officer who applied for the search warrant, pursuant to which a search was conducted of the premises known as "The Liberty Theatre" at 807 Liberty Avenue, Pittsburgh, Pa., was insufficient in that it did not afford a basis upon which the magistrate could have found probable cause to believe that Anthony Cesario had taken from a common carrier, i.e., The Greyhound Corporation, an obscene motion picture which had been carried from Ohio to Pennsylvania in interstate commerce.

The material seized pursuant to the search warrant included two films (and certain shipping documents) alleged to be obscene which the indictment charges were transported by means of common carrier in violation of Title 18, Sections 1462 and 2.

Each defendant asserts that the affidavit contained no statement that the cashier (who incidentally was not a government informant but simply an employee of the theatre) at the theatre who told the government agent of overhearing the arrangements being made for delivery of

the films was credible or the basis upon which she was thought to be credible. Each defendant contends that this omission is fatal. It is doubtful if such an omission was fatal but we need not pause to dwell upon that question because the agent recited much more in the affidavit including the following facts: He recited that he had gone to the Greyhound terminal in Pittsburgh and had obtained a waybill showing that the films had been shipped to Pittsburgh from Cleveland to the defendant, Cesario, and that Cesario had gone to the terminal and taken custody of them; that the films, or at least one of them, were advertised on the marquee of the theatre and that he had personally observed the films while they were shown in the theatre.

On the whole, the affidavit was amply sufficient to afford a basis upon which the magistrate could have issued the warrant.

/s/ BARRON P. MCCUNE

United States District Judge

APPENDIX C

Statutory And Constitutional Provisions

18 U.S.C. § 1462 Importation or transportation of obscene matters

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce –

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful –

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

As amended Jan. 8, 1971, Pub.L. 91-662, § 4, 84 Stat. 1973.

18 U.S.C. § 1465 Transportation of obscene matters for sale or distribution

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest. Added June 28, 1955, c. 190, § 3, 69 Stat. 183.

18 U.S.C. § 371 Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

First Amendment To The Constitution Of The United States.

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Fourth Amendment To The Constitution Of The United States.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment To The Constitution Of The United States.

"No person . . . shall . . . be deprived of life, liberty, or property, without due process of law . . ."

APPENDIX D

Affidavit On The Basis Of Which A Federal Search Warrant Authorizing Seizure Of Two Films Issued.

1. Affiant is a Special Agent of the Federal Bureau of Investigation, Pittsburgh Division, and has been such for the past 9 years.

2. On May 1, 1974, affiant saw an advertisement in the Allegheny Bulletin, Vol. I No. 6, dated May 1, 1974, that commencing May 3, 1974 the Liberty Theater, 807 Liberty Avenue, would be displaying the movie "P" by Tom plus additional unspecified film.

3. On May 3, 1974, affiant interviewed one Suzanne Simoni who stated that she was a cashier at said Liberty Theater and further stated that one Anthony Cesario of New York City is currently the manager of said theater.

4. On May 3, 1974, said interviewee further stated to affiant that on April 30, 1974 she was present and heard said Anthony Cesario speaking on the telephone with an employee of the Greyhound Bus Lines and asking whether a box for him had arrived.

5. On May 3, 1974, the above interviewee further stated that she was present on April 30, 1974 at the Liberty Theater when said Anthony Cesario stated to one Robert Leininger and herself that he (Cesario) was going over to the Greyhound Station in downtown Pittsburgh to pick up the film to be shown commencing Friday, May 3, 1974 and further that she was present later that day when Cesario entered the theater with a box stating that it was the film above mentioned.

6. Miss Simoni further advised affiant on May 3, 1974 that on May 1, 1974 she learned from conversation with Cesario that two films would be displayed by the

Liberty Theater commencing Friday, May 3, 1974 entitled "P" and "Getting It On".

7. On May 1, 1974, affiant personally obtained from one James Tedesco, Assistant Terminal Manager, Greyhound Lines at Pittsburgh, a copy of the waybill reflecting that on April 30, 1974, Anthony Cesario picked up an 11 pound box addressed to Anthony Cesario and coming from Cleveland, Ohio via Greyhound Lines which package was shipped from Cleveland on April 30, 1974. Tedesco further informed affiant that the Greyhound Corporation is an interstate common carrier.

8. On May 3, 1974, affiant personally viewed the two aforementioned films at the Liberty Theater which films portrayed sexual acts between nude males and females, including intercourse, fellatio and cunnilingus.

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(A description of both films follows at this point.)

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9. On May 8, 1974, affiant observed on the marquee of said Liberty Theater that the above two films were still being displayed.

/s/ PETER V. MARCOLINE, JR.

Peter V. Marcoline, Jr.
Special Agent, F.B.I.

Sworn and subscribed to this
8th day of May, 1974

/s/ ROBERT C. MITCHELL

United States Magistrate

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-236

MICHAEL KUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. A). The order of the district court is not reported (Pet. App. B).

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on June 20, 1975. A petition for rehearing and rehearing *en banc* was denied by the

court of appeals on July 15, 1975 (Pet. 1). The petition for a writ of certiorari was filed on August 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause to believe that the films "P" and "Getting It On" had been shipped in interstate commerce.

2. Whether search warrants in obscenity cases must be supported by a higher degree of probable cause than in other cases.

3. Whether petitioner was entitled to a hearing on his mid-trial motion to suppress the movie "It Happened In Hollywood."

4. Whether a survey of contemporary standards was properly found inadmissible at trial.

5. Whether contemporary community standards should be measured by the standards of patrons of "adult theaters."

6. Whether the films at issue are obscene.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of interstate transportation of obscene films by common carrier, in violation of 18 U.S.C. 1462 (Counts 1 and 2). Petitioner was also convicted of conspiracy to commit those offenses and to transport obscene films in interstate commerce for distribution, in violation of 18 U.S.C. 1462, 1465,

and 371 (Counts 5 and 6).[1] Petitioner was sentenced to three years' imprisonment on Counts 1, 2, and 5. Two and one-half years of each sentence were suspended, with the remaining six month terms to be served concurrently. He was also fined $2,000 each on Counts 1 and 2 and $1,000 on Count 5. Petitioner was sentenced to three years' probation on Count 6, with the condition that he refrain from transporting obscene material into the Western District of Pennsylvania. The court of appeals affirmed without opinion (Pet. App. A).

1. In 1973 petitioner was the operator of the American Management Company in Cleveland, Ohio. In that capacity he hired Randy Flynn to manage the Penthouse Adult Theater in Pittsburgh and later assigned Flynn to manage the Liberty Theater in Pittsburgh (Tr. 38-39, 293-295). Employees of the theaters were paid by American Management and petitioner received the theaters' receipts (Tr. 39-40, 301).

At petitioner's direction Flynn frequently picked up films for the Liberty Theater at the Greyhound Bus Station (Tr. 44, 95). Petitioner told Flynn that the films were hard-core pornography (Tr. 48).

In early 1974, Flynn obtained from petitioner at the Roxy Theater in Cleveland two copies of a movie entitled "It Happened In Hollywood" and transported the film by Greyhound Bus to Pittsburgh where it

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[1] Co-defendant Anthony Cesario was convicted of receiving obscene films in interstate commerce and of conspiracy to do so, in violation of 18 U.S.C. 1462 and 371 (Counts 3, 4, and 6).

played at the Liberty Theater (Tr. 49).[2] Flynn received another copy of the movie by mail (Tr. 50).[3]

Flynn was replaced as manager of the Liberty Theater about April 1974 by co-defendant Anthony Cesario (Tr. 38, 119, 153). On April 30, Cesario phoned the Greyhound Bus Station from the theater and asked if a package had arrived for him (Tr. 154). Cesario stated to Suzanne Simone, the theater cashier, that he was not going to "hang" for anyone, and then went to the bus terminal (Tr. 155). Cesario returned with a box and said that he had picked up the film to be shown May 3 (Tr. 156, 159).[4] Cesario also told Simone that the next films to be shown were "P" and "Getting It On" (Tr. 156). Both were shown at the Liberty Theater on May 3 (Tr. 254).

Agent Peter Marcoline, Jr., of the Federal Bureau of Investigation ("FBI"), after viewing both films at the Liberty Theater on May 3, prepared an affidavit in support of a search and seizure warrant and presented it to a United States magistrate (Tr. 254-255; Pet. App. D). At Marcoline's request the magistrate himself viewed the movies at the Liberty

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[2] A copy of "It Happened In Hollywood" was seized at the Roxy Theater in February 1974 (Tr. 48, 325); this movie was one of the films forming the basis of the Count 5 conspiracy charge.

[3] Flynn testified against petitioner after having been granted immunity by the district court.

[4] In testifying about Cesario's remarks, Simone used the terms "the film" and "the films" interchangeably (Tr. 156, 170, 181). The return address on the package, which had been sent from Cleveland, was false (Tr. 295).

Theater on May 8 (Tr. 255, 321). The magistrate then issued the warrant and the films were seized (Tr. 255-256).

2. The three films, "P," "Getting It On," and "It Happened In Hollywood" were shown at trial (Tr. 309, 312, 336). They depict in close detail various sexual activities engaged in by one person alone, or by couples, or by groups of persons.

Petitioner called two expert witnesses. Dr. Robert Loiselle, a psychologist, testified that the movies "P" and "Getting It On" do not appeal to prurient interests since they do not depict painful or violent sexual conduct (Tr. 463, 476-477). Dr. David Orr, a professor of English and student of European Renaissance drama, testified that all three films have literary merit (Tr. 487, 502).

ARGUMENT

1. Petitioner's hypertechnical objections to Agent Marcoline's affidavit, upon which the warrant issued, are without substance. Read in a "commonsense and realistic fashion" (*United States* v. *Ventresca*, 380 U.S. 102, 108), the affidavit provided an adequate basis for the magistrate's finding of probable cause that the films "P" and "Getting It On" had travelled in interstate commerce.[5]

[5] The portion of the affidavit relevant to the interstate transportation of the films appears at petitioner's Appendix D. The portion of the affidavit that describes the films to be seized appears in the joint appendix in the court of appeals at pages C3 through C9. That appendix, which is a part of the record, is on file with the Clerk of this Court.

The affidavit showed that on May 1, 1974, Agent Marcoline saw an advertisement in a local newspaper that "P" and an unspecified film would be shown at the Liberty Theater beginning on May 3. On May 1, Marcoline obtained a copy of a waybill from Assistant Terminal Manager James Tedesco of the Greyhound Bus Company in Pittsburgh. The waybill showed that an 11 pound box was shipped from Cleveland via Greyhound, a common carrier, on April 30, 1974. The package was addressed to Anthony Cesario, who picked it up on April 30.

Agent Marcoline also stated in his affidavit that on May 3 he interviewed Suzanne Simone, a cashier at the Liberty Theater. Simone stated that Cesario was the theater manager and that on April 30 he had telephoned a Greyhound employee and asked whether a box had arrived for him: Cesario then said that he was going to the Greyhound Station to pick up the film to be shown on Friday, May 3. Simone was present when Cesario returned to the theater carrying a box which he said contained the film previously mentioned. On May 1 Cesario told Simone that two films, "P" and "Getting It On," would begin showing on May 3.

Finally, Marcoline stated that he had viewed the films at the Liberty Theater on May 3 and that they were still showing there on May 8.

a. The Greyhound waybill showing that Cesario picked up a package addressed to him at the time and place related by Simone sufficiently corroborated Simone's information. See *Spinelli* v. *United States*,

393 U.S. 410, 416-418; *Draper* v. *United States*, 358 U.S. 307. Contrary to petitioner's claim, the corroborating facts were not insufficient because they were not independently incriminating, since wholly innocent facts may serve as adequate corroboration. See, *e.g.*, *Draper* v. *United States*, *supra*, 358 U.S. at 309-310.

b. Moreover, the affidavit sufficiently established Simone's reliability. Unlike the unnamed informants in *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, *supra*, Simone was identified by name and as the cashier at the Liberty Theater. Any skepticism which might properly have greeted information gained from an anonymous informant was not called for here, since the affidavit established Simone as a citizen witness in a position to know about matters concerning the theater and the films.[6] Contrary to petitioner's contention (Pet. 12-13), there is no requirement that the credibility of a citizen witness be supported by an *Aguilar*-type statement that the witness is credible, and in light of all the circumstances described in the affidavit the magistrate was justified in determining that Simone was credible without such a statement having been made. See *United States* v. *McCoy*, 478 F.2d 176, 179 (C.A. 10), certiorari denied, 414 U.S. 828; *United States* v. *Unger*, 469 F.2d 1283, 1286-1287 (C.A. 7), certiorari denied, 411 U.S. 920. See generally Thompson and Starkman,

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[6] There is nothing in the affidavit or in the record supporting petitioner's speculation (Pet. 16) that Simone could have been a professional informant.

The Citizen Informant Doctrine, 64 J. Crim. L. & C. 163 (1973).

c. Petitioner's attack (Pet. 18-19) on the trustworthiness of Cesario's statements to Simone regarding the film contained in the package is likewise insubstantial. Cesario's statements were declarations against penal interest which "carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search." *United States* v. *Harris*, 403 U.S. 573, 583.[7]

d. Petitioner urges (Pet. 21-22) that even if there was probable cause to seize the movie "P," there was no reason to believe that the movie "Getting It On" was transported in interstate commerce. The issue arises from inconsistent uses of the word "film."

In his affidavit Marcoline stated that he had seen an advertisement for a showing of "P" and an additional unspecified film; that Simone heard Cesario say on April 30 that "he (Cesario) was going * * * to pick up the film to be shown commencing Friday, May 3" (Pet. App. D, p. 38); and that Simone had seen Cesario enter the theater carrying a box which he said contained "the film above mentioned" (*ibid.*).

Petitioner claims that the last use of the word "film" above must refer only to the movie "P" because "P" is the only movie "above mentioned." However,

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[7] Petitioner urges that "Cesario did not admit a crime but only receipt of a film which was later judged to be obscene" (Pet. 19). That asserted distinction is of doubtful relevance in light of the content of the films, and is further weakened by Cesario's remark prior to picking up the films that he did not want to "hang" for anyone (Tr. 155).

it was reasonable for the magistrate to assume that the word "film" was used as a plural rather than, or as well as, a singular noun. Webster's *Third New International Dictionary* 850 (1971); Funk & Wagnall's *Standard College Dictionary* 498 (1966). The affidavit refers to the newspaper advertisement that two films would be shown at the Liberty Theater on May 3. Cesario advised Simone that he had picked up the film to be shown on May 3 and that "P" and "Getting It On" would both be shown commencing on that date. On May 3 Marcoline viewed both "P" and "Getting It On."

In sum, the affidavit contained sufficient facts from which the magistrate could conclude that there was probable cause to believe that both movies travelled in interstate commerce.

2. Petitioner contends (Pet. 20-21) that seizure of obscene materials must be founded on a higher degree of probable cause than is required in other circumstances. The cases upon which petitioner relies, however, do not support this proposition,[8] and in any event the affidavit here satisfied any reasonable standard of probable cause. In addition, the magistrate himself

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[8] Both *Marcus* v. *Search Warrant*, 367 U.S. 717, and *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, held that police officers' conclusory assertions of obscenity were inadequate bases upon which to issue warrants. No claim is made here that the assertions of obscenity were conclusory. In *Stanford* v. *Texas*, 379 U.S. 476, this Court held simply that when the items to be seized may warrant First Amendment protection, they must be described with sufficient particularity to avoid the evils of a general warrant. *Roaden* v. *Kentucky*, 413 U.S. 496, held only that the warrantless seizure of films was unreasonable absent exigent circumstances.

viewed the films (Tr. 255). Thus the magistrate was given full opportunity to "focus searchingly on the question of obscenity"; and the procedures here were adequate "to avoid suppression of constitutionally protected publications." *Marcus* v. *Search Warrant*, 367 U.S. 717, 731, 732.

3. Petitioner contends that a hearing should have been held on his motion, first made in the middle of trial, to suppress the film "It Happened In Hollywood" (Pet. 23-25). Petitioner's claim that he was surprised at the government's offer of this evidence is without merit: prior to trial the prosecutor, in response to a motion for discovery, informed petitioner that the film, as well as several others which were also identified by name, might be shown at trial (Tr. 327). Local police officers acting pursuant to a warrant had seized "It Happened In Hollywood" from petitioner's Roxy Theater in Cleveland well before trial (Tr. 323-325). The district court denied petitioner's mid-trial motion to suppress on the ground that it was untimely and because it appeared from the evidence that the film had been legally seized (Tr. 328-329).

The district court correctly determined that the mid-trial motion for a hearing was untimely. See *Nardone* v. *United States*, 308 U.S. 338, 341-342. Moreover, petitioner presented to the court no reason why the film should have been suppressed or why a hearing was necessary (Tr. 326-330). Absent an assertion that the motion was based on facts which might arguably warrant suppression, a hearing was not required. *Nardone* v. *United States*, *supra*, 308

U.S. at 342; *United States* v. *Culotta*, 413 F.2d 1343, 1345 (C.A. 2), certiorari denied, 396 U.S. 1019; *Cohen* v. *United States*, 378 F.2d 751, 760-761 (C.A. 9), certiorari denied, 389 U.S. 897.

Petitioner states (Pet. 22-23) that the Cleveland magistrate who authorized the seizure of "It Happened In Hollywood" had not previously viewed the film and notes that the constitutionality of such a procedure was specifically reserved in *Lee Art Theatre* v. *Virginia*, *supra*, 392 U.S. at 637. Petitioner did not, however, raise this issue at trial. Moreover, the affidavit underlying the Cleveland warrant is not part of the record and so it cannot be determined whether it might have been sufficiently descriptive for the magistrate to make an objective determination on the issue of obscenity without viewing the film. In these circumstances, the issue is not properly presented to this Court. *Hormel* v. *Helvering*, 312 U.S. 552, 556; see *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2.[9]

4. Petitioner contends that the district court erred in excluding the results of a survey purporting to show contemporary community standards (Pet. 25-28). The survey asked interviewees whether or not they favored the showing of films containing explicit sexual material (Tr. 386). The trial judge found

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[9] We believe, in any event, that a magistrate need not in all cases view the film to be seized prior to issuing a warrant. See *United States* v. *Sherpix, Inc.*, 512 F.2d 1361, 1368-1369 (C.A.D.C.); *Perial Amusement Corp.* v. *Morse*, 482 F.2d 515, 524 (C.A. 2); see also *United States* v. *Cangiano*, 491 F.2d 906, 913 (C.A. 2), certiorari denied, 419 U.S. 904.

the survey inadmissible on the grounds that "the answers to the questions would not be relevant or probative as to community standards with respect to these particular movies * * * because there is more than just explicit sexual conduct in these movies and there is more than deviant conduct" (Tr. 388).

Without disputing the general proposition that surveys of community standards are admissible in obscenity cases, we submit that surveys, like any other form of evidence, must be relevant to the case under consideration to satisfy threshold requirements of admissibility. The district court retains broad discretion in determining relevancy (*Hamling* v. *United States*, 418 U.S. 87, 124-125), and the district court did not abuse that discretion in excluding the evidence once it had found that the survey "is not probative of anything with respect to the community standards that would apply in this case * * * [since] the questions asked * * * do not cover the conduct * * * as depicted in the movie" (Tr. 388-389). Cf. *Jenkins* v. *Georgia*, 418 U.S. 153; *Hamling* v. *United States*, *supra*, 418 U.S. at 108-110.

In any event, an expert witness called by petitioner testified that under "contemporary norms" the films do not appeal to prurient interests (Tr. 463), and petitioner's counsel argued to the jury that the films were not obscene on the basis of that testimony (Tr. 595). Thus, even if it was error to exclude the survey, the error was harmless. *Hamling* v. *United States*, *supra*, 418 U.S. at 108-110.

5. Petitioner asserts that the patent offensiveness of films challenged as obscene should be judged by the

standards of those who attend "adult theaters" (Pet. 28-29). Petitioner bases this contention on *Mishkin* v. *New York*, 383 U.S. 502, in which this Court held that "[w]here the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large," the question whether it appealed to prurient interests may be "assessed in terms of the sexual interests of its intended and probable recipient group" (383 U.S. at 508, 509). But the films here were not designed for any identifiable deviant sexual group and they were disseminated to the general public. *Mishkin* is therefore inapposite.

6. The jury was instructed in accordance with the standards set forth in *Miller* v. *California*, 413 U.S. 15, 24, and the films fall squarely within the "plain examples" of obscenity noted in *Miller* (*id.* at 25). There is, accordingly, no need for this Court further to review the issue.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on November 11, 1975; and (2) granting the petition. As ground for this motion, petitioner states the following, which was available to petitioner but not previously presented:

The Decisions of the Third Circuit Concerning the Reliability of Informant's Tips are in Conflict.

In *United States v. McNally*, 473 F.2d 934 (3rd Cir. 1973), the Third Circuit reviewed the sufficiency of an affidavit for a search warrant based largely on information from an informant. The Court there applied a tripartite

analysis, derived from *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969): (1) Does the affidavit establish that the informant was credible *and* does it contain a recitation of the circumstances underlying the informant's conclusions? *Id.*, 473 F.2d at 937; (2) If not, is the information sufficiently corroborated to show that it was obtained in a reliable way? *Id.*, 473 F.2d at 938; (3) If not, is there other incriminating evidence or "indicia of criminal activity" in the affidavit "'which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed'"? *Id.*, 473 F.2d at 939 (quoting from *Spinelli, supra*).

In the decision which petitioner here seeks to have reviewed, however, the Third Circuit apparently overlooked its own tripartite analysis.[1] The discussion in the petition for a writ of certiorari established that the affidavit for the search warrant here contained no facts to indicate that the informant was credible, contained only *de minimus* corroboratory information, and contained no incriminating evidence apart from that provided by the informant (see Petition for Writ of Certiorari at 11-17). Hence, the Third Circuit was bound by its own precedent to declare the affidavit constitutionally inadequate. Yet it did not do so.

* * * * * * *

Four Justices[2] of this Court have already voted to grant petitioner's petition for certiorari on a ground other than the Fourth Amendment issue set forth in this Petition for Rehearing – in their opinion, the statutes under which petitioner was prosecuted are unconstitutional. However,

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[1] Since the ruling of the Third Circuit was not accompanied by an opinion, the precise basis for its decision cannot be definitely ascertained.

[2] One of the four Justices, Justice Douglas, has since retired from this Court. The other three Justices were Justices Brennan, Stewart and Marshall.

because these four Justices did not insist that the case be heard on the merits, the petition was denied. *Compare Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 560 (1957) (Harlan, J. concurring); *Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15, 18 (1959) (Douglas, J., concurring).

Furthermore, while voting to grant certiorari because of the unconstitutionality of the statutes, these four Justices did not consider whether certiorari should be granted because of the numerous other issues of critical importance to the trial of obscenity cases in federal courts which the petition presented. These additional issues included whether a defendant in an obscenity prosecution has a right to introduce survey evidence of community attitudes toward explicit sexual material (Question VI), whether probable cause must be established to a higher degree where the seizure of materials presumptively protected by the First Amendment is sought than otherwise (Question II), and whether the standard of offensiveness of a film must be judged in relation to the film's intended and probable recipient group (Question VII).

CONCLUSION

The conflict in the decisions of the Third Circuit has engendered uncertainty in a fundamental area of Fourth Amendment law. In view of this uncertainty, and the other important issues presented by the petition for certiorari, petitioner urges this Court to vacate its denial of his petition for certiorari, and to grant the petition.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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